No. 92-1168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TERESA HARRIS,

Petitioner,

—v.—

FORKLIFT SYSTEMS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE NOW LEGAL DEFENSE AND EDUCATION FUND, CATHARINE A. MACKINNON, THE AMERICAN JEWISH COMMITTEE, AMERICAN MEDICAL WOMEN'S ASSOCIATION, INC., ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASSOCIATION FOR UNION DEMOCRACY, THE CENTER FOR WOMEN POLICY STUDIES, CHICAGO WOMEN IN TRADES, THE ILLINOIS COALITION AGAINST SEXUAL ASSAULT, NATIONAL ORGANIZATION FOR WOMEN, INC., NATIONAL TRADESWOMEN'S NETWORK, NORTHERN NEW ENGLAND TRADESWOMEN INC., PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, THE WOMEN'S LAW PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici Curiae file this brief in support of petitioner. The specific statements of Amici Curiae are set forth in the Appendix.[1]

SUMMARY OF ARGUMENT

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), this Court held that Title VII protects women from sexually harassing conduct that creates a hostile work environment. To establish liability for hostile work environment sexual harassment a plaintiff must prove that unwelcome sex-based conduct altered the "terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). *Meritor* instructs that a plaintiff has established actionable sexual harassment when the conduct: (1) was so severe or pervasive as to alter the conditions of employment, creating an abusive working environment, *or* (2) had the purpose or effect of unreasonably interfering with her work performance, *or* (3) had the purpose or effect of creating an intimidating, hostile, or offensive working environment. *Meritor*, 477 U.S. at 65-67.

In the instant case and in previous cases, the Sixth Circuit has deviated from the standard which this Court set in *Meritor* by imposing additional and more stringent requirements for plaintiffs to establish hostile work environment sexual harassment under Title VII. Following its holding in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), the Sixth Circuit requires that a plaintiff prove that she suffered serious psychological injury as a result of the harassment and satisfy a reasonable person standard. The Sixth Circuit's extra requirements thwart the goals of Title VII and violate the standards this Court set in *Meritor*. The Sixth Circuit's analysis focuses on the plaintiff's percep-

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1 Amici Curiae file this brief with the consent of all parties. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

tion of and reaction to discrimination, not upon the defendant's conduct. This Court should reaffirm its holding in *Meritor*, stating a test which focuses on the defendant's conduct to assess liability in Title VII sexual harassment claims.

In enacting and implementing Title VII, Congress and this Court have recognized that the harm of discrimination is the discrimination itself. This Court should strike down any test which ignores the inherent harm of discrimination and forces plaintiffs to prove serious psychological injury and/or satisfy a reasonableness standard to establish liability in a sexual harassment case.

ARGUMENT

POINT I

A SEXUAL HARASSMENT TEST THAT FOCUSES ON THE EMPLOYEE RATHER THAN ON THE HARASSING CONDUCT THWARTS THE GOALS OF TITLE VII

A. This Court Correctly Defined The Standards For Hostile Work Environment Liability In *Meritor Savings Bank v. Vinson*

Congress's objective in enacting Title VII was to promote equal employment opportunity by eliminating all "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification[s]" in the workplace. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Harassment by an employer based on race, sex, ethnicity, or religion deprives workers of their right to participate in the workforce on an equal footing with others. *Meritor*, 477 U.S. at 64; *see also Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 230 n.13 (1982) (" 'Most people just want to work. That is all. They want an opportunity to work. [Congress is trying to see

that all people], no matter of what race, sex, or religious or ethnic background, will have equal opportunity in employment.' ") (quoting 118 Cong. Rec. 7569 (1972)). Specifically, recognition of the right to work in an environment free of sexual harassment is mandated by Title VII's goal of striking at " 'the entire spectrum of disparate treatment of men and women' in employment." *See Meritor*, 477 U.S. at 64 (quoting *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

Liability for sexual harassment under Title VII may be predicated on either of two types of conduct: (1) harassment in which the grant or denial of concrete employment benefits are conditioned on sexual favors ("*quid pro quo*" sexual harassment), or (2) harassment that, while not necessarily directly affecting economic benefits, creates a hostile or offensive working environment.[2] *Meritor*, 477 U.S. at 65. In explaining hostile work environment sexual harassment, this Court cited with approval the E.E.O.C. Guidelines, *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), and *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). Looking to these three sources, this Court gave the guidance necessary for a trier of fact to determine whether a hostile work environment sexual harassment claim had been established. The *Meritor* Court discussed approvingly the definition set forth in the E.E.O.C. Guidelines for hostile work

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2 The defendant's conduct may violate *quid pro quo* or hostile environment sexual harassment or fall somewhere in between on a continuum of conduct. The E.E.O.C. recognized this continuum when it adopted its Guidelines, which state that hostile work environment sexual harassment may be shown by any one of three results: "(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1983).

environment sexual harassment that unwelcome sex-based harassment is unlawful if " 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.' " *Meritor*, 477 U.S. at 65 (citation omitted). The *Meritor* Court also cited *Henson* for the proposition that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Id.* at 67. This Court also noted that the Fifth Circuit in *Rogers* first recognized the hostile work environment cause of action, holding that

> a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employers by giving discriminatory service to its Hispanic clientele. . . . The phrase "terms, conditions, or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.

Meritor, 477 U.S. at 66 (citation omitted). Elaborating on the guidance provided by *Rogers*, this Court specifically concluded that sexual harassment should be evaluated by the same standards as racial harassment.[3]

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as

3 Recently, this Court reaffirmed the Meritor ruling that racial and sexual harassment claims should be evaluated by the same standards. *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989).

> demeaning and disconcerting as the harshest of racial epithets.

Id. at 66-67 (quoting *Henson*, 682 F.2d at 902) (emphasis in original).

The *Meritor* Court directed the trier of fact to pursue a fact-based inquiry to determine whether the alleged harassing conduct altered the terms, conditions, or privileges of the plaintiff's employment in violation of Title VII. Courts should consider the severity and pervasiveness of the acts, the meaning of such acts in light of the history of discrimination implicated in the charge, and the context in which these acts occur. *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) ("the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct"). In fact, courts applying *Meritor* have analyzed pervasiveness by examining the number and frequency of specific alleged harassing acts, and have analyzed severity by examining the egregiousness of the acts. *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 577 (2d Cir. 1989) (pervasiveness); *Ellison*, 924 F.2d at 878 (9th Cir. 1991) (pervasiveness); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1511 (11th Cir. 1989) (severity). While courts have stated that a single racial or sexual epithet, without more, is unlikely to give rise to liability, *Ellison*, 924 F.2d at 876 (quoting *Meritor*, 477 U.S. at 67); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987), courts also recognize that where the alleged conduct was highly threatening to members of the protected group, a one time or infrequent occurrence would suffice. *Vance*, 863 F.2d at 1511. Finally, these considerations must be evaluated under the totality of the circumstances. *Meritor*, 477 U.S. at 69.

By fashioning a test which recognizes that liability for sexual harassment may be predicated upon a hostile work environment, this Court defined the range of sexual harassment claims actionable under Title VII and acknowledged that harassing behavior based upon an employee's sex is a significant impediment to the employee's ability to succeed in the

work environment. *Meritor*, 477 U.S. at 66-67 (citing *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)). Harassment works to remove members of protected groups from the workplace or to hinder their effective and equal participation, thereby impeding them from having access to equal opportunity in the workplace.[4] *Meritor*, 477 U.S. at 66-67. Sexual harassment of women perpetuates the historical power imbalance between women and men in the work setting.[5] Sexual harassment can communicate that women are objects of sexual aggression, submissive to male desires, and valued for their sexual attributes rather than for that which they can offer as credible co-workers. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1526 (M.D. Fla. 1991) (citing Kathryn Abrams, *Symposium: The State of the Union: Civil Rights:*

4 Different surveys have found that anywhere from 42 percent to 88 percent of women report experiencing sexual harassment in the workplace. Mark Pazniokas, *Capitol Confronts Sexual Coercion*, THE HARTFORD COURANT, Feb. 13, 1993 at A1. Most victims of sexual harassment are women. Less than one percent of sexual harassment charges involve women as alleged perpetrators. Peg Meier, *New Awareness Has More Men Charging Harassment*, STAR TRIBUNE, Sept. 14, 1992 at 1E; *see also* U.S. Merit Systems Protection Board, *Sexual Harassment In the Federal Workplace: Is It a Problem?* 33-40 (1981) (sexual harassment of women in the federal government is widespread); U.S. Merit Systems Protection Board, *Sexual Harassment In the Federal Government: An Update* 11-22 (1988) (sexual harassment of women in the federal government is still widespread).

5 The effects of the historical power imbalance between men and women are clear in the traditionally male workplace. In addition to performing the tasks which their male peers must perform, women in non-traditional jobs often have to successfully contend with sexual harassment to achieve the same level of success. A recent survey by Chicago Women in Trades of 182 women who worked in traditionally male trade industries (including plumbers, electricians, carpenters, fire fighters, and police officers) revealed that 88 percent of these women were exposed to pictures of naked or partially dressed women in the workplace, 83 percent received unwelcome sexual remarks, and 57 percent were subjected to offensive touching or requests for sex. Laurie W. LeBreton and Sara S. Loevy, *Breaking New Ground: Worksite 2000, A Report Prepared by Chicago Women in Trades* 1, 6-9 (1992).

Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1212 n.118 (1989)), *appeal pending*, (11th Cir. argued Dec. 2, 1992). Further, harassment can be "highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse." *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988); *see also Ellison*, 924 F.2d 872, 879 n.9 (9th Cir. 1991). It is precisely this perpetuation of inequality between men and women in the workplace which Title VII was intended to redress.

B. The Sixth Circuit's Additional And More Stringent Requirements To Establish Hostile Work Environment Liability Are Improper And Should Be Reversed

In the pending case, *Harris v. Forklift Systems, Inc.*,[6] the courts below applied the Sixth Circuit requirements set forth in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). *Rabidue* and its progeny acknowledge that sexual harassment based on a hostile or abusive work environment violates Title VII, but depart significantly from the standards this Court set forth in *Meritor*. *Harris*, at A-14-15 (citing *Rabidue*, 805 F.2d at 620).

The *Rabidue* court created a restrictive test for evaluating whether the alleged harassing conduct altered the "terms, conditions, and privileges of employment:" "the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance *and* creating an intimidating, hostile, or offensive working environment that affected seriously the psycho logical [sic] well-being of the plaintiff." *Rabidue* 805 F.2d at 618-20 (emphasis added) (citation omitted). In

6 *Harris v. Forklift Sys., Inc.*, No. 3-89-0557, 1990 U.S. Dist. LEXIS 20115 (M.D. Tenn. Nov. 27, 1990), *adopted by*, No. 3-89-0557, 1991 U.S. Dist. LEXIS 20940 (M.D. Tenn. Feb. 4, 1991), *aff'd*, 976 F.2d 733 (6th Cir. 1992) (appended to the Petition for Writ of Certiorari to the United States Court of Appeals For Sixth Circuit) (hereinafter cited to as *Harris*, at A-__).

addition, the *Rabidue* court stated that a plaintiff may not prevail in a hostile work environment sexual harassment claim "in the absence of conduct which would interfere with th[e] hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances."[7] *Id.* at 620.

The Sixth Circuit's deviation from the test promulgated in *Meritor* reveals significant misunderstandings about the nature of sexual harassment. In *Meritor*, this Court did not impose a duty upon claimants to prove serious psychological injury or to meet a reasonableness standard. Any test for sexual harassment liability that requires plaintiffs to prove the extent of their injury as a result of the consequences of discrimination improperly requires courts to focus on the plaintiff instead of on the defendant's conduct.[8]

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7 A number of courts have explicitly or implicitly declined to adopt some or all of the restrictive standards set forth in Rabidue. *See Ellison*, 924 F.2d at 877 (expressly declining to follow *Rabidue* standards); *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 577-78 (2d Cir. 1989) (no requirement of serious psychological injury or satisfaction of a reasonable person standard); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482, 1485 (3d Cir. 1990) (expressly rejecting *Rabidue* by holding derogatory language and pornography in workplace can violate Title VII, but applying "psychological stability" and "reasonable person of the same sex" language); *Bennett v. Corroon & Black Co.*, 845 F.2d 104 (5th Cir. 1988) (no requirement of serious psychological injury or satisfaction of a reasonable person standard); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987) (same); *Robinson*, 760 F. Supp. at 1525-27 (rejecting *Rabidue* reasoning and result but applying court's own subjective and objective test; finding serious psychological injury and satisfaction of a reasonable woman standard). *But see Brooms v. Regal Tube Co.*, 881 F.2d 412, 418-19 (7th Cir. 1989) (citing *Rabidue* standard with approval).

8 Testimony by the victim about the harassing conduct and how it affected the victim's work environment is relevant evidence in a sexual harassment case. The court should, in fact, take into account the victim's perspective and circumstances in analyzing the conduct. *See Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991). The evaluation is gender-neutral in the sense that a man may prove discrimination under the same standard. But it is not gender-blind in the sense that the court should not ignore the harmful effects of a long history of discrimination in assessing the meaning and seriousness of alleged discriminatory conduct. As one commentator observed,

> A woman struggling to establish credibility in a setting in which she may not be, or may not feel, welcome, can be swept off balance by a reminder that she can be raped, fondled, or subjected to repeated sexual demands. . . . The feelings of anxiety, fear, or vulnerability produced by the specter of sexual coercion prevent women from feeling, or being viewed as, the equals of their male counterparts in the workplace.

Kathryn Abrams, *Symposium: The State of the Union: Civil Rights: Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1208 (1989); *see also Ellison*, 924 F.2d at 879.

In *Davis v. Monsanto Chemical Co.*, 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989), the Sixth Circuit implicitly recognized the impropriety of the *Rabidue* holding and refused to apply the restrictive standard set forth in *Rabidue* in a racial hostile work environment case. The court thus revealed its discomfort in applying the restrictive *Rabidue* test where the factual circumstance concerned a form of discriminatory abuse of which the court disapproved. The *Davis* court created a false distinction between the standards applicable for race- and sex-based hostile work environment claims. In making such a distinction, *Davis* departed from the holding in *Meritor*, which expressly equated the standards for proving sexual harassment and racial harassment.[9] *Meritor*, 477 U.S. at 67.

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9 Another Sixth Circuit panel expressly rejected *Davis'* distinction between racial and sexual harassment, noting that *Davis* "was a departure from the standard intended to be applicable to both racial and sexual harassment causes of action predicated upon a pervading hostile climate within the workplace generally . . . ." *Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475, 485 (6th Cir. 1989).

1. Liability In Sexual Harassment Cases, Like Other Discrimination Cases, Turns On The Harmful Nature Of The Discriminatory Conduct

The appropriate standard in sexual harassment cases is one which recognizes that sexual harassment is akin to other types of discrimination. For example, plaintiffs in Title VII disparate treatment cases are not required to make any showing of the consequences of invidious differential treatment, such as mental anguish or psychological harm, to establish liability. Even in Title VII disparate impact cases, in which proof of discriminatory intent is not required, plaintiffs are not required to show that they suffered any harm in addition to the harm of subjection to a discriminatory employment practice. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

In this respect, Title VII law converges with constitutional discrimination law. For example, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the plaintiffs were not required to prove the individual consequences of the injury they suffered by being forced to attend segregated schools. Rather, this Court recognized that segregation was itself injurious because "[s]eparate educational facilities are inherently unequal." *Id.* at 495. This Court held that the harm of segregation was itself sufficient to entitle plaintiffs to equitable relief. *Id.* at 494. Segregation, like all discrimination, generates inferiority and lowers the status of the group which is discriminated against. *See id.*

This is no less true in the sexual harassment context. *Rabidue* and its progeny depart from the standards for harassment claims in race, religion, and national origin cases in which there is no requirement that plaintiffs demonstrate the consequences of the discrimination or satisfy a reasonableness standard.[10] Consistent with this Court's decision in *Meritor*,

10 *See, e.g., Snell v. Suffolk County*, 782 F.2d 1094, 1103 (2d Cir. 1986) (race); *E.E.O.C. v. Beverage Canners, Inc.*, 897 F.2d 1067, 1070, 1072 (11th Cir. 1990) (race); *Nazaire v. Trans World Airlines*, 807 F.2d 1372, 1380 (7th Cir. 1986) (race), *cert. denied*, 481 U.S. 1039 (1987); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924 (5th Cir. 1982) (race);

many courts have rejected the notion that any distinction should exist between the standards for sexual and racial harassment claims.[11] While proof of the extent of the injury is a prerequisite to a determination of damages in discrimination cases, it is not a prerequisite to finding liability. The Sixth Circuit sexual harassment test effectively puts the cart before the horse by making plaintiffs prove the extent of their *damages* before the court *liability*. Plaintiffs who seek compensatory damages must show the extent of their injuries only to establish the amount of their damages.

2. Proof Of Serious Psychological Injury Is Unworkable

In addition, the Sixth Circuit's hostile work environment test requires plaintiffs to show that they have suffered *serious* psychological injury.[12] Proof of serious psychological injury in the

Rogers v. E.E.O.C., 454 F.2d 234, 238 (5th Cir. 1971) (race), *cert. denied*, 406 U.S. 957 (1972); *Bishena v. Marriott Corp.*, 959 F.2d 239 (9th Cir. 1992) (religion); *Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1384 n.5 (10th Cir. 1991) (national origin); *Cariddi v. Kansas City Chiefs Football*, 568 F.2d 87, 88 (8th Cir. 1977) (national origin); *but see Davis*, 858 F.2d at 349 (race); *Turner v. Barr*, 806 F.Supp. 1025, 1027 (D.D.C. 1992) (religious harassment case citing *Davis*).

11 *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d at 1486, (3d Cir. 1990) (citing *Ways v. City of Lincoln*, 871 F.2d 750, 754-55 (8th Cir. 1989)); *Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475, 485 (6th Cir. 1989) (reflecting equal treatment of racial and sexual harassment in § 1983 context); *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934, 944-45 (D.C. Cir. 1981); *Robinson*, 760 F. Supp. at 1532. In addition, the E.E.O.C. Compliance Manual, quoted extensively by this Court in *Patterson*, provides that the principles involved with respect to harassment on the basis of race, color, religion or national origin apply with equal force to sexual harassment. E.E.O.C. Compliance Manual (CCH) § 615.7 *Harassment on the Bases of Race, Religion, and National Origin: (b) Applicable Principles and Standards.*

12 *See Harris*, at A-19 ("[S]ome of [defendant's] inappropriate sexual comments . . . offended plaintiff . . . . However, I do not believe they were so severe as to be expected to seriously affect plaintiff's psychological well-being."); *see also Highlander v. K.F.C. Nat'l Manage-*

context of sexual harassment claims under Title VII is improper. *See United States v. Burke*, __ U.S. __, 112 S.Ct. 1867, 1876 (1992) (Scalia, J., concurring).

Not all women who are victims of sexual harassment suffer serious psychological harm as a result of such harassment. Nonetheless, the harassment may be so severe or pervasive that it alters the conditions of their employment and creates an abusive working environment. Those women who are able to cope with harassment should not be forced to endure it simply because they can maintain their mental health. Also, many women are forced by their economic circumstances to endure and continue working in an environment in which they are subject to sexual harassment.

Different women react differently to sexual harassment.[13] Women employ various mechanisms to cope with sexual harassment ranging from tolerating harassing behavior and remaining quiet, to adopting the attitudes of men in the workplace in an attempt to fit in and avoid harassment, to challenging the harassment. Laurie W. LeBreton and Sara S. Loevy, *Breaking New Ground: Worksite 2000, A Report Prepared by Chicago Women in Trades* 1, 21 (1992). Because women react differently, determining liability based on the responses of the

ment Co., 805 F.2d 644, 650 (6th Cir. 1986) (citing *Rabidue*, 805 F.2d at 620) ("[T]his court must . . . consider whether the charged sexual harassment had the effect of . . . creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff.").

13 In *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal pending*, (11th Cir. argued Dec. 2, 1992) a case involving sexual harassment in non-traditional employment, K.C. Wagner, an expert witness, testified about the various coping methods of women confronted with sexual harassment, including avoiding the harassment, denying it, making some kind of joke about it, threatening to make complaints, and—the riskiest and least-used strategy—actually making complaints. Transcript of Non-Jury Trial Proceedings at 96, *Robinson v. Jacksonville Shipyards, Inc.*, Case No. 86-927-Civ.-J-12 (M.D. Fla. Jan. 26, 1989); *see also* Sally J. Kaplan, *Consequences of Sexual Harassment in the Workplace*, 6 Affila 50, 53 (Fall 1991).

victims of sexual harassment likely will lead to inconsistent and illogical results.

Further, Title VII protection attaches before victims of sexual harassment "go crazy." *See Ellison v. Brady*, 924 F.2d 872, 877-78 (9th Cir. 1991). Were this not the case, victims of sexual harassment would have to endure harassment to the point of serious mental debilitation, a proposition which lacks any support in Title VII jurisprudence.[14] *Id.* at 878. It would be preposterous to assert that the plaintiff in a sexual harassment case must suffer serious psychological injury to prevail in a suit seeking equitable relief, "[t]o hold otherwise would mean that every person who brings such a suit implicitly asserts he or she is mentally unstable, obviously an untenable proposition." *Vinson v. Superior Court*, 43 Cal. 3d 833, 840, 740 P.2d 404, 409 (1987). While the mere utterance of a sexual epithet which engenders offensive feelings in an employee may not in itself constitute harassment, it is clear that an employee should not be forced to endure harassment to the point of debilitation to assert a Title VII claim. *See Rogers*, 454 F.2d at 238.

In addition, requiring sexual harassment plaintiffs to prove serious psychological injury at trial is unfair because it subjects plaintiffs who have already suffered as a result of the harassing conduct to a second victimization. *See* Jean A. Hamilton, Sheryle W. Alagna, Linda S. King, Camille Lloyd, *The Emotional Consequences of Gender-Based Abuse in the Workplace:*

14 See *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 578 (2d Cir. 1989) ("A female employee need not subject herself to an extended period of demeaning and degrading provocation before being entitled to seek the remedies provided under Title VII."); *Burns v. McGregor Elec. Indus., Inc.*, No. 92-2059, 1993 U.S. App. LEXIS 6336 (8th Cir. Mar. 30, 1993) at *19 ("A woman does not have to endure a hostile environment in order to keep her job until she can find one elsewhere.").

Requiring a woman to remain at work and endure harassment to the point of mental breakdown is also contrary to the principle that plaintiffs have a duty to mitigate their damages. *See generally Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 231 (1982) (Title VII claimant has statutory duty to minimize damages); 42 U.S.C. § 2000e-5(g).

New Counseling Programs for Sex Discrimination, in *Women, Power, and Therapy* 155 (1987). Victims of sexual harassment describe their experience of sexual harassment in terms similar to those used by rape victims: they "feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry." Catharine A. MacKinnon, *Sexual Harassment of Working Women* 47 (1979). For example, the plaintiff in *Brooms* testified that following her subjection to racial and sexual harassment she suffered debilitating depression:

> After working at Regal, I was afraid to leave my home and was unable to socialize. I was terrified that my former boss would find me and continue to assault me. I cut off all my hair to disguise myself. I began psychiatric treatment for the first time in my life in August 1984, for over a year, and I was diagnosed as traumatized, phobic and unable to work.

The Civil Rights Act of 1990: Joint Hearings on H.R. 4000 Before the House Committee on Educ. and Labor and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess. 17 (1990). Like rape victims, most victims of sexual harassment never file complaints. Many sexual harassment victims are either too ashamed to make the harassment public and remain silent, thus devastating their self-esteem and health, or they leave their jobs without complaint, thus threatening the survival of themselves and their families. *See* Catharine A. MacKinnon, *Sexual Harassment: Its First Decade in Court*, in *Feminism Unmodified* 103, 114 (1987).

Proof of a plaintiff's psychological injury should only be required if the plaintiff requests damages as compensation for psychological injury; proof of psychological injury has no place in proving liability under Title VII. *See Cody v. Marriott Corp.*, 103 F.R.D. 421, 422 (D. Mass. 1984). In addition, it is not necessary that the plaintiff submit to a mental examination or provide expert testimony to prove her entitlement to damages for psychological harm. Courts routinely allow awards for

mental anguish in civil rights cases without expert testimony.[15] Instead, damages are determined simply by demonstrating the nature of the conduct and its effect on the plaintiff. *Carey v. Piphus*, 435 U.S. 247, 263 & n.20 (1978).

3. The Reasonable Person Standard Is Inappropriate

The *Rabidue* trial court derived the reasonable person standard from the statement in the E.E.O.C. Guidelines that the defendant's conduct must have "the purpose or effect of *unreasonably interfering* with an individual's work performance. . . ." 29 C.F.R. § 1604.11(a)(3) (emphasis added), mistakenly concluding that the word " 'unreasonably' opens the door" to consideration of a host of factors about the plaintiff and the work environment.[16] *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). The ease with which other courts uncritically adopted the language of "reasonableness"[17] likely was inspired by the familiar use of "rea-

15 *See, e.g., Carrero v. New York City Housing Auth.*, 890 F.2d 569, 581 (2d Cir. 1989) (sexual harassment plaintiff's testimony about her feelings, corroborated by testimony of co-workers who saw her crying, supports pain and suffering award); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1425 (7th Cir. 1986) (award to racial harassment plaintiff supported by testimony of plaintiff and his wife that plaintiff was harmed); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 760-61 (9th Cir. 1985) (plaintiff's testimony about her feelings supported damage award), *aff'd*, 834 F.2d 697 (8th Cir. 1987); *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1238 (D.C. Cir. 1984) (racial harassment plaintiff entitled to damages based solely on her testimony).

16 In contrast, the unreasonable interference standard in the E.E.O.C. Guidelines does not focus on the reasonableness of the plaintiff, but on whether the defendant's conduct created an unreasonable degree of interference with the plaintiff's work.

17 A number of circuits use some form of reasonableness standard in Title VII sexual harassment cases. *See, e.g., Burns*, No. 92-2059, 1993 U.S. App. LEXIS 6336 at *5 n.3 ("[T]he appropriate standard is that of a reasonable woman under similar circumstances."); *Ellison*, 924 F.2d at 879 (9th Cir. 1991) ("conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and

sonableness" as a standard in tort law. However, the reasonable person standard in tort law is not applied to the plaintiff's behavior, but to the *defendant's*. Courts have inappropriately injected the reasonable person standard into sexual harassment cases by focusing on the reasonableness of the plaintiff's perception of and response to the defendant's conduct, rather than on the conduct itself. The focus of the court's inquiry should be directed to the defendant's conduct; the reasonableness of any particular plaintiff's reaction to that conduct is irrelevant. "If defendant's conduct was sufficiently extreme to violate Title VII, then plaintiff's reaction to or interpretation of that conduct is unimportant."[18] *Jennings v. D.H.L. Airlines*, 101 F.R.D. 549,

create an abusive work environment"); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) ("the discrimination would detrimentally affect a reasonable person of the same sex in that position"); *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 192-93 (1st Cir. 1990) ("the conduct was not of the type that would interfere with a reasonable person's work performance, nor would it seriously affect a reasonable person's psychological well-being. . . ."); *Yates v. Avco*, 819 F.2d 630, 637 (6th Cir. 1987) ("person standing in the shoes of the employee should be 'the reasonable woman' "); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989) (consider "the likely effect of a defendant's conduct upon a reasonable person's ability to perform his or her work"); *Waltman v. International Paper Co.*, 875 F.2d 468, 476 (5th Cir. 1989) (citing *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988)) (referencing 5th Circuit decision stating "any reasonable person would have to regard these cartoons as highly offensive . . . .").

18 Plaintiffs in hostile environment race harassment lawsuits generally are not required to show that their response to the harassment was reasonable. *See, e.g., Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971) (Title VII violation established upon showing that employer created work environment "heavily charged with ethnic or racial discrimination"), *cert. denied*, 406 U.S. 957 (1972); *Accord Nazaire v. Trans World Airlines*, 807 F.2d 1372, 1380 (7th Cir. 1986), *cert. denied*, 481 U.S. 1039 (1987); *Snell v. Suffolk County*, 782 F.2d 1094, 1103 (2d Cir. 1986); *Gilbert v. City of Little Rock*, 722 F.2d 1390, 1394 (8th Cir. 1983); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358 (11th Cir. 1982); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924 (5th Cir. 1982). To the extent that courts have employed a reasonable person standard in race cases, it is as a result of their uncritical application of the Sixth Circuit's reasonable-

551 (N.D. Ill. 1984); *see also* Note, *Sexual Harassment Claims of Abusive Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1463 (1984).

The *Rabidue* "reasonable person" standard in sexual harassment cases forces plaintiffs to prove that discrimination at work is worse than discrimination in society. For example, because sexually explicit material is prevalent in society, the *Rabidue* court concluded that the display of sexually explicit posters in the workplace would not detrimentally affect a reasonable individual. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 622 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). In support of its finding that the plaintiff's response to the harassment was unreasonable, the *Rabidue* court noted the "lexicon of obscenity that pervaded the environment of the workplace" and the "reasonable expectation of the plaintiff upon voluntarily entering that environment" that she would encounter such abuse. *Id.* at 620. Conduct that is prevalent in society may be abusive in the workplace, denying employees their Title VII right to be treated equally. *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 n.3 (11th Cir. 1987) (the "whole point" of a sexual harassment claim is often that conduct permissible in a social setting is inappropriate when carried out in the workplace). Thus, by adverting to the prevalence of discrimination in society, the *Rabidue* court accepted discriminatory behavior in the workplace and penalized the plaintiff for entering a workplace pervaded with discriminatory conduct. The *Rabidue* court thereby vitiated Title VII's objective of *changing* the workplace.[19]

ness inquiry that was first enunciated in *Rabidue*. *See, e.g., Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989) (adopting, without discussion, reasonable person standard in *Davis*).

19 As Judge Keith poignantly noted in his dissent in Rabidue, what society condones is irrelevant, especially when one considers that society at one point also condoned slavery. *Rabidue*, 805 F.2d at 627 (Keith, J., dissenting on plaintiff's substantive claims and concurring on issue of successor liability); *see also* Guido Calebresi, *Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem* 28 (1985) (discussing danger that reasonableness standard might exclude viewpoints of powerless groups).

While Congress did not expect Title VII to eliminate all private prejudice overnight, it enacted Title VII to "alter the dynamics of the workplace, . . . operat[ing] to prevent bigots from harassing their co-workers." *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988) (explaining *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987)), *cert. denied*, 490 U.S. 1110 (1989); *see also DeGrace v. Rumsfeld*, 614 F.2d 796, 805 (1st Cir. 1980) (an employer cannot change employee's personal beliefs, but can let it be known that racial harassment will not be tolerated and take reasonable measures to enforce this policy).[20] Thus, although the appropriate Title VII inquiry is whether the conduct was discriminatory because it diminished the plaintiff's status in the workplace and hindered equal employment opportunity, *Rabidue* instead focused on whether the defendant's conduct violated societal norms.[21] *See* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L.J. 1177, 1205 (1990).

20 In other contexts, this Court has held that discrimination cannot be justified by the prevalence of private prejudice. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect").

21 In other cases in which defendants sought to defend discrimination as simply a reflection of societal norms, courts rejected the *Rabidue* analysis. *See Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1525-27 (M.D. Fla. 1991) (rejecting the social context argument espoused in *Rabidue*, and noting that this analysis "violates the basic tenet of the hostile work environment cause of action, the necessity of examining the totality of the circumstances"), *appeal pending*, (11th Cir. argued Dec. 2, 1992). *See also Walker*, 684 F.2d at 1359 & n.2 (11th Cir. 1982) (the social milieu does not diminish the impact of racial slurs); *Sparks*, 830 F.2d at 1561 n.13 ("[behavior that] may be permissible in some settings . . . can be abusive in the workplace . . . ."); *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 n.11 (5th Cir. 1989) (the "heavy pollution defense" is inconsistent with *Vinson* and *Henson*). *See generally* Catharine A. MacKinnon, *Sexual Harassment: Its First Decade In Court*, in *Feminism Unmodified* 115 (1987) ("If the pervasiveness of an abuse makes it nonactionable, no inequality sufficiently institutionalized to merit a law against it would be actionable.").

Since *Rabidue*, the Sixth Circuit has altered its restrictive reasonableness standard by comparing the plaintiff to a reasonable woman rather than to a reasonable person. *Yates v. Avco*, 819 F.2d 630, 637 (6th Cir. 1987) ("person standing in the shoes of the employee should be 'the reasonable woman' "). However, modifying the reasonable person test to a reasonable woman test does not adequately rehabilitate it. The reasonable woman standard still focuses the inquiry on the plaintiff's reactions rather than on the defendant's conduct and engages the court in making value judgments as to which responses by women are reasonable and which are not.[22] *See Rabidue*, 805 F.2d at 627 (Keith, J., dissenting on plaintiffs substantive claim and concurring on issue of successor liability).

Requiring a sexual harassment plaintiff to satisfy a reasonable woman standard lays the foundation for improper and abusive inquiries about the plaintiff, such as looking to her past sexual history, including sexual abuse or rape, on the grounds that such an examination could uncover whether she is hysterical or oversensitive, and thus not reasonable. *See Carter v. Social Sec. Admin.*, 856 F.2d 202 (Fed. Cir. 1988) (available in No. 88-3088 (Fed. Cir. Aug. 29, 1988) (WESTLAW, Allfeds File)) at *2 (Nies, J., dissenting) (evidence that sexual harassment claimant had "a vindictive personality" relevant to whether she "unreasonably ma[d]e more of the [petitioner's stroking her buttocks with his hand] than a reasonable person would attribute to it"). Some courts have recognized that in sexual harassment cases, as in rape cases, inquiry into past sexual history is impermissible because it subjects victims of sexual harassment to a second victimization on the witness stand.[23]

22 In tort law "perpetrators are required to take victims as they find them, so long as they are not supposed to be doing what they are doing." Catharine A. MacKinnon, *Sexual Harassment: Its First Decade In Court, in Feminism Unmodified* 108 (1987).

23 *See, e.g., Priest v. Rotary*, 98 F.R.D. 755, 762 (N.D. Cal. 1983) (deposition inquiry into past sexual history of sexual harassment plaintiff, like rape victim, is more "harassing and intimidating" than probative); *Vinson v. Superior Court*, 43 Cal. 3d 833, 843, 740 P.2d 404, 411

> The possibility that tactics such as [inquiry into plaintiff's sexual history] might intimidate, inhibit, or discourage Title VII plaintiffs . . . would clearly contravene the remedial effect intended by Congress in enacting Title VII, and should not be tolerated by the federal courts. . . . Sexual harassment plaintiffs would appear to require particular protection from this sort of intimidation and discouragement if the statutory cause of action for such claims is to have meaning. Without such protection from the courts, employees whose intimate lives are unjustifiably and offensively intruded upon in the workplace might face the "Catch-22" of invoking their statutory remedy only at the risk of enduring further intrusions into irrelevant details of their personal lives in discovery, and, presumably, in open court.

Priest, 98 F.R.D. at 761. Plaintiffs with valid sexual harassment claims most certainly would be discouraged from pursuing those claims because they justifiably fear that filing a sexual harassment lawsuit would occasion highly intrusive exploration into the details of their private lives. *Id.*; *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525, 531 (M.D. Fla. 1988).

The decisions in *Rabidue* and *Harris* demonstrate the manner in which the reasonableness inquiry can be used to penalize sexual harassment victims. In *Rabidue*, the description of Vivienne Rabidue as "independent, ambitious, aggressive, intractable and opinionated" and as having "an abrasive, rude,

(1987) (plaintiff's sexual history and practices not relevant to claim for emotional distress). The concept of double-victimization has often been recognized in the context of rape prosecutions. *See, e.g., Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 222, 814 P.2d 1341, 1353 (1991) (recognizing that "victims of rape were often victimized a second time" during trial, California enacted a "rape shield law" which limits the admissibility of evidence of a complainant's sexual history); *People v. Griffen*, 138 Misc. 2d 279, 282, 524 N.Y.S.2d 153, 155 (Sup. Ct. Kings County 1988) (New York enacted a "rape shield law" which limits the admissibility of evidence of the victim's sexual conduct to "bar harassment of victims with respect to irrelevant issues").

antagonistic, extremely willful, uncooperative, and irascible personality," *Rabidue*, 805 F.2d at 615, effectively removed her from the class of reasonable women and permitted the court to ignore the conduct to which she was subject—including being referred to as " 'fat ass,' " and being one of a group of women employees who was referred to as " 'whores,' " " 'cunt,' " " 'pussy,' " and " 'tits.' "[24] *Rabidue*, 805 F.2d at 624 (Keith, J., dissenting on plaintiffs substantive claim and concurring on issue of successor liability) (citing *Rabidue v. Osceola Ref. Corp.*, 584 F. Supp. 419, 423 (E.D. Mich. 1984)). Likewise, in *Harris v. Forklift Systems, Inc.*, the magistrate judge evaluated plaintiff's hostile environment claim in light of the fact that she was a "managerial employee" who "cursed and joked and appeared to her co-workers to fit in quite well."[25] *Harris*, at A-18-19. Reasonableness, whether couched in the language of a

24 Professor Nancy Ehrenreich comments that the dissenting judge in Rabidue viewed the reasonable woman test as distinguishing between unprotected "neurotic" women and protected "reasonable" women. *Pluralist Myths*, 99 Yale L.J. at 1217. If discrimination occurred, the fact that an individual plaintiff is "neurotic," or not "possessed of a pleasing personality," *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 941-42 (D.N.J. 1978), *vacated in part on other grounds*, 473 F. Supp. 786 (D.N.J. 1981), should not prevent that individual from making out a claim of discrimination. Moreover, if discrimination occurred and harmed an individual who was uniquely vulnerable to harm, that individual is entitled to obtain whatever recompense for the resulting harm that is available under prevailing law. *See Valdez v. Church's Fried Chicken*, 683 F. Supp. 596, 611-17 (W.D. Tex. 1988).

25 Inquiry into the plaintiff's character should not be used to waive her legal protection against harassment. *See Swentek v. USAir, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987) ("Plaintiff's use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment.' "); *Katz v. Dole*, 708 F.2d 251, 254 n.3 (4th Cir. 1983) ("A person's private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment."); *Burns v. McGregor Elec. Indus., Inc.*, No. 92-2059, 1993 U.S. App. LEXIS 6336 at *9 (8th Cir. Mar. 30, 1993) (the plaintiff's "private life, regardless how reprehensible the trier of fact might find it to be, did not provide lawful acquiescence to unwanted sexual advances at her work place by her employer").

reasonable person or a reasonable woman, operates as a vehicle for the introduction of sex stereotyping, diverts the otherwise straightforward Title VII inquiry into the defendant's conduct, and devolves into an inquiry about the character of the victim in light of societal norms.

POINT II

THIS COURT SHOULD REAFFIRM MERITOR BY USING A CONDUCT-BASED TEST FOR ASSESSING LIABILITY FOR SEXUAL HARASSMENT UNDER TITLE VII

A. The Conduct-Based Test

This Court should reaffirm the *Meritor* test for assessing liability for hostile work environment sexual harassment under Title VII which focuses on the defendant's conduct rather than on the plaintiff. This Court should reject any requirement that the plaintiff prove serious psychological injury to establish hostile work environment liability.[26] As stated by this Court in *Meritor*, the test for hostile work environment liability is broad and flexible. Unwelcome sex-based conduct is unlawful dis-

26 Harassing conduct need not be directed solely at the plaintiff for Title VII liability to attach. Courts have held that Title VII liability applies when the work environment as a whole is hostile to people in the same protected class as the plaintiff. *See, e.g., Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (woman who has never herself been the object of sexual harassment might have Title VII claim if she were forced to work in atmosphere where such harassment was pervasive); *Rogers v. E.E.O.C.*, 454 F.2d 234, 239 (5th Cir. 1971) (unlawful employment practice could be based on discriminatory behavior toward clients of employer, and not employee, since employee could suffer "the consequences of such a practice"), *cert. denied*, 406 U.S. 957 (1972); *see also Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1385 (10th Cir. 1991) (Title VII liability attaches on claim of harassment based on race and national origin where work environment was hostile to all Iranians and blacks).

crimination when the plaintiff establishes proof which satisfies any one of the following formulations of the test: (1) The conduct is sufficiently severe or pervasive as to alter the conditions of the victim's employment, *or* (2) the conduct has the purpose or effect of (a) creating a hostile, offensive or abusive working environment, *or* (b) unreasonably interfering with the victim's work performance. Satisfaction of any one of these three standards would satisfy the requisite standard of proof. Each one of these standards vindicates Title VII's goal of affording employees the right to work in an environment free from discriminatory intimidation, ridicule and insult. *See Meritor*, 477 U.S. at 65-67 (1986) (citing the various hostile work environment standards with approval). *See also Ellison v. Brady*, 924 F.2d 872, 877 (9th Cir. 1991) (the various standards cited in *Meritor* are not inconsistent). This analysis is to be determined under a totality of the circumstances. *Id.* at 69.

A conduct-based test will not significantly alter the number of viable claims for sexual harassment under Title VII. The plaintiff must, of course, also prove that she is a member of the protected group, that the alleged discriminatory conduct was unwelcome and sex-based, and that the defendant was legally responsible. A solitary incident of harassment will not be actionable unless it is sufficiently severe *See Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989). The determination of whether the defendant's conduct is actionable is a question of fact to be decided by a trier of fact.[27] The goals

27 The trier of fact may be a judge (where equitable relief only is sought or jury demand waived) or jury. 42 U.S.C. § 1981a(c) (amending Title VII to provide right to jury trial). Whether certain conduct constitutes sexual harassment is precisely the type of factual determination which judges and juries make every day. In fact, our legal system is based on the premise that juries are not only capable of making these types of factual determinations, but that they are the preferred body to make such determinations. Even if the case is tried to a judge, there should be no prejudice to defendants. A factfinder "[w]ith access to all the evidence, and with the common sense to make credibility determinations . . . should not find it difficult to distinguish between harassing actions that constitute a violation of Title VII and those 'ambiguous'

of Title VII, as stated by Congress and interpreted by courts, should guide factfinders in determining when sexual harassment has occurred.[28]

A conduct-based test recognizes that Title VII is meant to combat discrimination by identifying and enjoining it and by compensating for the injury caused by it.[29] The conduct-based test preserves both of these important functions—a liability analysis that focuses on whether defendant's conduct constituted unlawful discrimination, and a damages analysis that focuses on the impact of that conduct on the plaintiff. Unlike the psychological injury test, the conduct-based test does not penalize plaintiffs by forcing them to prove both actionable harassment *and* the extent of their injury as a consequence of

actions which simply may not 'create an abusive working environment.' " *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 n.13 (11th Cir. 1987) (citation omitted).

28 *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990) (Title VII prevents "the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women"); *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982) ("Title VII prohibits employment discrimination on the basis of gender, and seeks to remove arbitrary barriers to sexual equality at the workplace") (citations omitted); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 326 (N.D. Cal. 1992) (Title VII's purpose is to "promote gender-equal opportunity in the work force").

29 In 1991, Congress specifically recognized that Title VII should also address the harms suffered by individual victims of sexual harassment by expanding the remedies available to individual sexual harassment victims. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2). Harms to individual victims of sexual harassment include depression, headaches, sleeplessness, anxiety, nausea, mental anguish, humiliation, and reduced self-esteem. *See, e.g., Vinson v. Superior Court*, 43 Cal. 3d 833, 837, 740 P.2d 404, 409 (1987); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 417 (7th Cir. 1989). *See also* Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 Cal. L. Rev. 775, 783 (1991); Peggy Crull, Ph.D., *Stress Effects of Sexual Harassment on the Job: Implications for Counseling*, 52 Amer. J. Orthopsychiatry 539, 541 (1982).

the harassment in order to establish liability. Liability is established upon a court's determination that the defendant's conduct constituted sexual harassment. The determination of whether a defendant's conduct rises to the level of actionable harassment should be made with reference to the defendant's conduct, the hostile nature of such conduct in the workplace, and the goals of Title VII. This is consonant with the Title VII principle that discrimination is a harm in itself.

In addition, plaintiffs may seek equitable relief, recover compensatory damages based on a showing of the nature and extent of the injury, and punitive damages upon a showing of egregiousness on the part of the defendant. While demonstrating the extent of injuries may be appropriate to prove damages, the *Meritor* Court correctly omitted any requirement that plaintiffs show the extent of their injury as a consequence of the harassment to establish liability for sexual harassment under Title VII. "Though it is quite possible for a victim of race- or sex-based employment discrimination to suffer psychological harm, her entitlement to [backpay] under Title VII does not depend on such a showing." *United States v. Burke*, __ U.S. __, 112 S. Ct. 1867, 1876 (1992) (Scalia, J., concurring).

B. How *Harris* Would Have Been Analyzed Using A Conduct-Based Test

Were the *Harris* case to have been analyzed using the conduct-based test, instead of the more stringent *Rabidue* test, Teresa Harris would have prevailed in the lower courts. The fact that she did not prevail illustrates the danger of a test which requires a plaintiff to prove serious psychological injury and satisfy a reasonableness standard.

Specifically, the magistrate judge's finding that the defendant's conduct was not sufficiently severe or pervasive so as to create a hostile, abusive or offensive working environment under the totality of the circumstances is indefensible in light of the court's simultaneous finding that "[p]laintiff was the object of a continuing pattern of sex-based derogatory conduct

from [the defendant]."[30] *Harris*, at A-8. In fact, it is unmistakeable that defendant's conduct was both derogatory and continuous and sufficently severe and pervasive to create a hostile, abusvie or offensive working environment. As the magistrate judge noted: (1) defendant would ask female employees to retrieve coins from his front pants pocket; (2) defendant stated to the plaintiff in the presence of other employees " 'You're a woman, what do you know,' " " 'You're a dumb ass woman,' " and " 'Let's go to the Holiday Inn to negotiate your raise,' " *id.* at A-9 (citations omitted); and (3) defendant continued to harass plaintiff even after she complained to him about his behavior towards her, *id.* at A-10.

Further, the magistrate judge found that "some of [defendant's] inappropriate sexual comments, . . . offended plaintiff, and would offend the reasonable woman. However, . . . they were not so severe as to be expected to seriously affect plaintiff's psychological well-being." *Id.* at A-19. This court's unwarranted use of the standards of reasonableness and serious psychological injury allowed it to dismiss plaintiff's Title VII claims even when the factual circumstances clearly indicate that she was subject to sexual harassment.

This Court has never held that harassing conduct must be so severe as to seriously affect the mental health of plaintiffs or that plaintiffs must withstand a reasonableness inquiry to establish liability under Title VII. Title VII would be crippled by such requirements. Title VII's mandate of providing women equality in the workplace is manifestly disserved when a court dismisses a case in which the plaintiff proves that she was sub-

30 The magistrate judge found that Harris satisfied the other four elements of its test: "Teresa Harris is a woman, and thus a member of a protected class; there is no proof that male employees of Forklift were subjected to the conduct complained of by plaintiff; and Charles Hardy, the party allegedly responsible for committing the sexual harassment, is President of the company . . . ." *Harris*, at A-17. Teresa Harris also established that the conduct was unwelcome because she complained to the defendant about his sexually crude comments. *Id.* at A-10.

ject to unwelcome and continuous derogatory conduct based on her sex, and that a reasonable woman would have been offended by such conduct. Accordingly, this Court should overturn the Sixth Circuit's test and return sexual harassment law to its proper place in Title VII jurisprudence.

CONCLUSION

For these reasons, Amici Curiae respectfully request this Court to reverse the Sixth Circuit's decision in *Harris* and reestablish the standards for proof of hostile work environment set out in *Meritor*.

Respectfully Submitted,

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APPENDIX

APPENDIX

STATEMENTS OF INTEREST

Interest Of Amicus Curiae NOW Legal Defense And Education Fund

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, such as sexual harassment. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting sexual harassment, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal pending*, (11th Cir. argued Dec. 2, 1992), and *Townsend v. Indiana University*, No. 92-2869 (7th Cir. argued April 6, 1993).

Interest Of Amicus Curiae Catharine A. MacKinnon

Catharine A. MacKinnon, Professor of Law at the University of Michigan, is an authority on sex equality who pioneered the legal claim for sexual harassment as sex discrimination, as reflected in her *Sexual Harassment of Working Women* (1979). She was co-counsel to Mechelle Vinson in the Supreme Court in *Meritor Savings Bank v. Vinson* and consults extensively on legislation, litigation (including *Robinson v. Jacksonville Shipyards*), administration, policy, and counseling issues in the sexual harassment area.

Interest Of Amicus Curiae The American Jewish Committee

The American Jewish Committee ("AJC") is a national civic organization of approximately 50,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. AJC has always believed that this goal can best be accomplished by helping to preserve and promote

the constitutional rights of all Americans. Specifically, AJC strongly supports full and equal rights for women and is committed to the elimination of all gender-based discrimination, regardless of the form in which it may appear. Sexual harassment of women is a flagrant and intolerable form of such discrimination.

Interest Of Amicus Curiae
American Medical Women's Association, Inc.

Amicus American Medical Women's Association, Inc. ("AMWA") is a nonprofit organization of 13,000 women physicians and medical students, founded in 1915 and representing women in all specialties of medicine and diverse career roles. One of AMWA's primary missions is to promote career development for women in medicine. AMWA strongly opposes sexual harassment and other forms of gender discrimination which interfere with an individual's ability to work effectively within her/his profession.

Interest Of Amicus Curiae
Asian American Legal Defense And Education Fund

Founded in 1974, the Asian American Legal Defense and Education Fund ("AALDEF") is a civil rights organization that addresses critical problems in the Asian American community through litigation, advocacy, and community education. Its current program priorities include voting rights, immigrant rights, labor and employment rights. AALDEF represents victims of anti-Asian violence and seeks redress for Japanese Americans who were interred in U.S. camps during World War II. Asian Americans, as victims of sexual harassment, endure the harmful consequences of abusive conduct.

Interest Of Amicus Curiae
Association For Union Democracy

The Association For Union Democracy ("AUD") is a nonprofit corporation founded in 1969 which seeks to further democratic principles and practices in American labor organizations, both by encouraging union members to participate actively in the internal life of their unions, and by protecting the exercise of their democratic rights within their unions. No other organization devotes itself primarily to this objective. The AUD Women's Project, created in 1985, helps women union members working for sexual equality on the job and in their unions. Since 1985, the Project has advised hundreds of women subjected to sexual discrimination and harassment at work. The Association's experience leads it to conclude that hostile working environments in the form of verbal abuse, physical abuse and displays of pornographic material contribute to discrimination against women in the workplace.

Interest Of Amicus Curiae
The Center For Women Policy Studies

The Center for Women Policy Studies was founded in 1972 as the first national policy research and advocacy institute focused exclusively on issues of social and economic justice for women. The Center conducts research and advocacy programs on sexual harassment and violence against women, work/family and "diversity" policies of employers, education, and other relevant issues.

Interest Of Amicus Curiae Chicago Women In Trades

Chicago Women in Trades ("CWIT") is an organization that assists and advocates for tradeswomen and women seeking entry into blue-collar nontraditional employment. CWIT hosts monthly support meetings, provides training to women interested in the trades, works to increase the number of women in the trades, and advocates for equal employment opportunities. CWIT is concerned with the legal standards for proving sexual harassment because sexual harassment is a pervasive problem for many tradeswomen.

Interest Of Amicus Curiae
The Illinois Coalition Against Sexual Assault

The Illinois Coalition Against Sexual Assault is a private, non-profit, tax-exempt coalition of member centers which pro-

vide services to adult survivors of rape, incest and childhood sexual abuse, assault victims and sexual harassment victims throughout Illinois. Member centers see sexual harassment victims who are suffering from many of the same traumas that rape victims suffer. The injury will be compounded if, before establishing an actionable case, the victim must suffer severe psychological injury. By eliminating review of the character and coping mechanisms of individual plaintiffs, the court can focus on the nature of the act as harmful to all employees. The burden will then be rightfully placed on those who act discriminatorily rather than on those who struggle to deal with a discriminatory workplace.

Interest of Amicus Curiae
National Organization for Women, Inc.

The National Organization for Women ("NOW") is the nation's largest feminist organization devoted to the advancement of women's rights, with over 280,000 members and more than 700 chapters in all 50 states and the District of Columbia. NOW has, since its inception, supported and worked toward full equal employment opportunity for women, including the elimination of sexual harassment and other sex discrimination in the workplace.

Interest Of Amicus Curiae National Tradeswomen's Network

The National Tradeswomen's Network ("NTN"), founded in 1989, is a network of organizations committed to significantly increasing the numbers and diversity of women entering and working in non-traditional blue collar occupations. NTN represents tens of thousands of women across the United States. Sexual harassment is a major barrier facing tradeswomen. According to a recent survey by Chicago Women in Trades, tradeswomen report that on the job site: 88 percent have encountered pictures of naked or partially dressed women; 83 percent have received unwelcome sexual remarks; and 57 percent reported being touched or asked for sex. Women entering traditionally male workplaces should not have to tolerate sexual harassment in any form. As working women, we demand respect and dignity in our lives as workers.

Interest Of Amicus Curiae
Northern New England Tradeswomen Inc.

Northern New England Tradeswomen ("NNETW") is a non-profit membership organization founded in 1987, for tradeswomen and friends in Vermont, New Hampshire, New York, Massachusetts, Maine and Quebec. NNETW serves over 1000 people and its goal is to increase the opportunities for women to enter and remain in the trades through networking, advocacy, training and sharing resources. Women in the trades encounter intense sexual harassment, often in the form of a hostile work environment. NNETW believes that it is time to stop expecting women to "deal with" harassment or get out of the trades; it is time to make the workplace less hostile.

Interest Of Amicus Curiae
Puerto Rican Legal Defense and Education Fund

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") is a national civil rights organization founded in 1972 to protect the civil rights of Puerto Ricans and other Latinos, and to ensure their equal protection under the law. PRLDEF opposes all forms of discrimination based on race, religion, sex, sexual orientation, national origin and disability. Sexual harassment is an all too prevalent problem facing Latina workers. PRLDEF believes that sexual harassment should not be subject to a higher standard of proof than other forms of discrimination.

Interest Of Amicus Curiae Women's Law Project

The Women's Law Project ("WLP") is a non-profit, feminist legal advocacy organization, located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the nineteen years of its existence, WLP's

activities have included extensive work in the area of sex discrimination in employment. WLP has a strong interest in the eradication of sexual harassment and other forms of discrimination against women in the workplace and the availability of strong and effective remedies under Title VII of the Civil Rights Act of 1964, as amended.